United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7414

ORIGINAL

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P/S

In The

United States Court of Appeals

For The Second Circuit

DIANA M. SCHUM,

Plaintiff-Appellant,

vs.

CHARLES P. BAILEY, M.D., PERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I TO XXXV, including each and every number between I and XXXV inclusive,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE, CHARLES P. BAILEY, M.D.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DIANA M. SCHUM,

Plaintiff-Appellant

- against -

CHARLES P. BAILEY, M.D., PERUO HIROSE, M.D., ST. BARNABAS HOSPITAL FOR CHRONIC DISEASES and DOES I TO XXXV, including each and every number between I and XXXV inclusive

Defendants-Appellees

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On Appeal From United States District Court
Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE CHARLES P. BAILEY, M.D.

PRELIMINARY STATEMENT

This is the memorandum of law submitted on behalf of the defendant-appellee CHARLES P. BAILEY, M.D. ("BAILEY") in connection with an appeal from an order of the Court below granting summary judgment.

STATEMENT OF ISSUES PRESENTED

1) Was the Court below, correct in the granting of summary judgment dismissing the complaint of the plaintiff?

2) Was there any extension of the applicable statutes of limitations?

The Court below was correct in the dismissal of the complaint of the plaintiff in that the applicable statute of limitations was an absolute defense.

STATEMENT OF THE CASE

A) Jurisdiction - diversity of citizenship, being the basis of jurisdiction is not in dispute.

B) Procedural History - Following the service of the

summons and complaint, issue joined, notices of motion, dated 27th January, 1975 (A-13) and 31st January, (A-19), the Court below, the Honorable Richard Owen, DJ., by an order dated the 23rd day of June, 1975, granted both motions and dismissed the complaint inasmuch as the applicable statutes of limitations were an absolute defense to the prosecution by the plaintiff of the causes of action as set forth in the complaint.

C) Statement of Facts - The four counts of the complaint, can be completely summarized as follows:

1) An unnecessary operation
2) Lack of informed consent
3) Assault and trespass resulting from (2) and
4) Fraud

BAILEY, a physician duly licensed to practice medicine in the State of New York, last treated the plaintiff on the 21st day of October, 1970. Suit was commenced on or about the 4th day of October, 1974. All of the facts, as set forth in the complaint of the plaintiff, in the court below for purposes of the motion only, are deemed true and correct (A1 11). Plaintiff received treatment at ST. BARNABAS HOSPITAL on the 20th day of October, 1967. Treatment as set forth in the supporting affidavit (A25 and 26) by BAILEY, continued up to and including the 21st day of October, 1970. In the opposing affidavit of the plaintiff (A27 31) the dates above set forth, are not, in any way disputed.

LAW

POINT I

THE CAUSES OF ACTION IN THE COMPLAINT, WERE PROPERLY DISMISSED.

New York Law, as set forth, at CPLR 214-6, reads as follows:

> "The following actions must be commenced within six (6) years.
>
> "An action to recover damages for malpractice."

Suit as to BAILEY, commenced at any time prior to the 21st of October, 1973, would have been timely. Suit however, was commenced on the 4th day of October, 1974, almost one (1) year beyond. Plaintiff acknowledges that the action was commenced within the three (3) years as above set forth of the date of last treatment.

As to the theory, of continuous treatment, the attention of the Court is respectfully directed to BORGIA v. CITY OF NEW YORK, 12 NY 2d, 151, 237 NY Supp 2d 319 (1962) wherein the Court stated:

> "The law question is does such a claim accrue on the date of a negligent act or omission or at the end of a continuous course of medical treatment by the accused hospital...
>
> "We hold that at least when the course of treatment which includes the wrongful acts or omissions as one continuously and is related to the same original conditional complaint, the accrual comes only at the end of the treatment.
>
> "Little argument is needed to prove the proposition that the continuous treatment theory is the fairer one. It would be absurb to require a wronged patient to interrupt corrected efforts by serving the summons on the physician, the hospital superintedent or by filing a notice of claim in the case of the City Hospital. The case now under review will illustrate. The child by reason of the hospital personnel's negligence severed permanent brain damage at a hospital on the night he was admitted and on three (3) later occasions was a victim of negligence amounting to malpractice. Acceptance by us of the City's argument that the ninety (90) days ran from the last malpractice would mean that, if the child had remained in the hospital a few days longer than he did, the ninety (90) day

> period would have expired while he was still a patient receiving care and treatment related to the conditions produced by earlier wrongful acts and omissions of plaintiff's employees."

The sole question raised on this appeal, revolves about the rule dealing with foreign objects.

As to the doctrine of foreign objects, vis-a-vis the statute of limitations, the service of the summons and complaint on BAILEY would result in an extension of the time within which to commence suit unless the doctrine is not extended. As regards the foreign object doctrine, the attention of the Court, is respectfully directed to FLANAGAN v. MT EDEN GENERAL HOSPITAL, 24 NY 2d 427, 301 NY Supp 2d 23 (1969) wherein the Court stated:

> "After setting forth the facts that the plaintiff an operation was performed on July 14, 1958 with the discovery in 1966 of surgical clamps. The statute of limitations was extended with the following language
>
> "It is clear now that a fundamental difference exists, for the purpose of statute of limitations between negligent medical treatment and medication cases and cases involving negligent malpractice of physicians for hospitals in which a foreign object is left in the plaintiff's body. In the latter no claim can be made if the patient's actions may be feigned or frivolous. In addition, there is no possible causal break between the negligence of the doctor or hospital and the patient's injury.
>
> "The so called discovery rule employed in foreign object material malpractice cases is incompatible harmony with the purpose for which statutes of limitations were enacted and strikes of fair balance in the field of medical malpractice. The unsoundness of the traditional rule, as applied in the case where an object is discovered in the plaintiff's body, is patent. It simply places an undue strain upon common sense, reality, logic and simple justice to say that a cause of

> action had accrued to the plaintiff until the x-ray examination disclosed the foreign object within her abdomen and until she had reasonable basis for believing or reasonable means of ascertaining that the foreing object was within her abdomen as a consequence of the negligent performance of the operation...
>
> "In the case before us, the danger of belated, false or frivolous claims is eliminated. In addition, plaintiff's claim does not raise questions as to creditability nor does it rest on professional diagnostic judgment or discretion. It rests solely on the presence of a foreign object within her abdomen.
>
> "The policy of insulating defendants with the burden of defending stale claims brought by a party who, with the reasonable diligence, could have instituted the action more expeditiously if not a convincing justification with a harsh consequences resulting from applying the same concept of a cool and foreign object cases as is applied in medical treatment cases. A clamp, though immersed within the plaintiff's body and undiscovered for a long period of time, retains its identity so that the defendant's ability to defend a stale claim is not unduly impaired.
>
> "Therefore when a foreign object has negligently been left in the patient's body, the statute of limitations will not begin to run until the patient could have reasonably discovered the malpractice."

There is no allegation in the complaint of the plaintiff's to the effect that a foreign object was negligently left in the body of the plaintiff.

In DOBBINS v. CLIFFORD, 39 App. Div. 2d 1, 330 NY Supp 2d 743 (Fourth-1972) there was a further discussion and elaboration of the doctrine regarding foreign objects. The Court stated the general rule in malpractice actions is that the cause of action accrues on the date the alleged

act of malpractice occurred, even though it may not be discovered until after the three (3) year statute of limitations has run...there are two recognized exceptions to the general rule. One is the continuous treatment exception... and the other is the foreign object exception...

It is clear that the continuous treatment exception is not applicable to any of the causes of action.

Prior to the decision in FLANAGAN v. MT. EDEN GENERAL HOSPITAL (Cit. omit) there would be no question that plaintiff's action would be barred by the three (3) year statute of limitations.

The question of extending the holding in FLANAGAN the other types of malpractice was considered...in MURPHY v. ST. CHARLES HOSPITAL, 35 App. Div. 2d 64, 312 NY Supp 2d 978 (Second-1970) and SHIPMAN v. HOSPITAL FOR JOINT DISEASES, 36 App. Div. 2d 31, 319 NY Supp 2d 674 (Second-1971) Mot 4 Liv. to App. Den., 29 NY 2d 483, 324 NY Supp 2d 483, 324 NY Supp 2d 1028 (1971). In MURPHY, the Court extended FLANAGAN to cover situation where a prosthesis, that was surgically inserted in a patient's hip, broke four (4) years later, necessitating surgery to remove it. In SHIPMAN, the Court refused to extend FLANAGAN to a case involving a mistaken diagnosis.

> "We believe that by following the rational in FLANAGAN, the rule can be extended to cover the facts in the instant case and the same fundamental factors are present in each. There are an act of malpractice committed internally so that discovery is difficult; real evidence of the malpractice in the form of the hospital record is available at the time of trial, at time of suit, professional diagnostic judgment is not involved and there is no danger of false claims."

There is no such claim made by the plaintiff, in the complaint which was dismissed by the Court below.

The foreign object doctrine, sets forth three rather strigent prerequisites (1) no question of creditability, (2) no question of professional judgment or discretion and (3) no question of ready discoverability.

Here the claimed unnecessary surgery, was if anything, patent, obvious and open. The affidavit of the plaintiff when read in conduction of the complaint, reveals that questions of professional judgment and discretion are presented by the complaint.

The basic underlying criteria for the foreign object doctrine, to be applied to the facts in the complaint as set forth below, are not presented in the complaint which was dismissed in the Court below.

In the opinion of the Court below (A-37) there was a direct and pointed reference to the above

> "Having carefully reviewed plaintiff's complaint herein, as well as all the affidavits, arguments submitted on this motion, it is clear that plaintiff does not come within the exception permitted by DOBBINS. In particular, it is clear from paragraphs 9, 12 and 13 of the complaint, that the thrust of plaintiff's cause of action is the professional diagnostic judgment of doctors BAILEY and HIROSE and their decision that the plaintiff required surgery for what they considered to be a serious cardiac anomaly."

The extension of the foreign object doctrine has NOT met with favor in the Courts of New York. In this regard, the attention of the Court, is respectfully directed to SOSNOW v. PAUL, 33 NY 2d 780, 369 NY Supp 2d 693 (1975, affirming on the opinion below, 43 App. Div. 2d 978, 352 NY Supp 2d 502 (Second-1974) wherein the following language is significant

> "In an action against two architects to recover damages for alleged faulty performance of their services, defendant's appeal from an order of Supreme Court, Nassau County, dated August 18, 1972 which

denied their motion to dismiss the complaint on the ground of statute of limitations.

"Order reversed, on the law...motion granted and complaint dismissed...the buildings were subsequently constructed in accordance with defendant's plans, specifications and/or completed on or about April 26, 1965.

"It is undisputed that the summons commencing the suit was served on defendants on or about September 30, 1971. Both parties agree that the three (3) year statute of limitations applies to both causes of action, since defendant's alleged malpractice is truly the basis for the cause of action sounding in breach of contract. The parties disagreed, however, as to when the causes of action actually accrued.

"The rule in cases where the gravamen of the suit is professional malpractice is now and has always been that the cause of action accrues upon the performance of the work by the professional...this rule was relied on by defendants in their appeal on this brief and was amply substantiated by them with viable case law. Plaintiffs have failed to cite a single applicable case abrogating that rule.

"The FLANAGAN case permits an exception to the cited rule only in medical malpractice cases where the malfeasance change is leaving a foreign object in the patient's body. In SHIPMAN v. HOSPITAL... we made it clear that it was the opinion of this Court that FLANAGAN should be limited to such cases."

The attention of the Court is further directed to GILBERT v. MILLSTEIN, 33 NY 2d 857, 352 NY Supp 2d 198, (1973), wherein the Court, once again, affirming on the decision of the Court below, at 40 App. Div. 2d 100, 338 NY Supp 2d 370 (1972) set forth the following this is an action brought to recover for alleged malpractice of an attorney, from the appeal from an order striking the defense of the statute of limitations brings before this Court the vexing problem of when the cause of action for attorney malpractice

accrues.

"Notwithstanding that the action is thus grounded on allegations of negligence occurring shortly after defendants retain - 1963, the action was not commenced until August 17, 1970. Since it further appears that the action was brought more than three (3) years after the attorney client relationship had terminated, we conclude that it was error to check the validity of the defense grounded on the statute of limitations.

"The general holding consistently followed in the State, is that a cause of action for malpractice occurrs at the time of the wrongful act or omissions of the defendant... in 196[illegible], however, as an exception to this general holding as applied to medical malpractice cases, it became settled that when the course of medical treatment which includes the alleged wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the accrual comes only at the end of the treatment...this continuous treatment rule is held equally relevant to the conduct of litigation by attorneys. The resemblance between thhe continuance treatment of the condition of a patient by a physician and the continuous representation of a client in a lawsuit by an attorney is more than superficial. In both instances the relationship between the party is marked by trust and confidence; in both there is present an aspect of the relationship not sporatic but developing; and in both the recepient of the service is necessary at a disadvantage for the tactics employed or the manner in which the tactics are executed...

"But the basis for special terms and determination is unsupportable on general principles and on specific authority. Knowledge of the invasion of a right has not been considered critical in determining the

> time when a cause of action accrues...this is the general rule applied in this state in medical malpractice cases... Furthermore, there is specific authority in this state and general authority elsewhere to the effect that the accrual of a cause of action for attorney malpractice is not postponed until time of discovery.
>
> "With due regard to the general holding of the decision cited in the preceding paragraph and although the legislature has repeatedly rejected the proposals to fix a limitation period in malpractice causes based on the time of discovery...the courts in this state have applied a time of discovery rule in those medical malpractice cases involving foreign objects in the plaintiff's body and in cases of internal injury malpractice where a discovery... is difficult... But it is held that it is doubtful whether the role of the Appellate Division as an intermediate Appellate Court would allow it to depart further from the traditional view of the statute of limitations than FLANAGAN sanctions; a question of public policy in the interpretation of the statute and the balance between the legislature and the courts in changing the rule of the law is plainly raised, which the close division in the votes of the number of the court in FLANAGAN demonstrates...
>
> "In any event, should we assume that the FLANAGAN holding should be broadly applied to attorney malpractice cases where the malpractice is concealed or where a discovery thereof would not become available or manifest in the excercise of the diligent, the record before us nevertheless requires a determination sustaining the defense of the statute of limitations."

At present the law in New York, as regards to the foreign object doctrine, has been significantly set forth at CPLR214-A, which, reads as follows

> "An action for medical malpractice is to be commenced within two (2) years and six (6)

months exception.

> "An action for medical malpractice must be commenced within two (2) years and six (6) months of the act, omission or failure complained of or last treatment where there was continous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure provided, however, that where the action is based upon the discovery of a foreign object in the body of of the patient, the action may be commenced within one (1) year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, which ever is earlier. For purposes of this section the term continuous treatment shall not include an examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition. For the purpose of this section, the term foreign object shall not include a chemical compound, fixation device or prosthetic aid or device."

The public policy in New York State is clear. The foreign object doctrine is NOT extended.

In MODAVE v. LONG ISLAND JEWISH HOSPITAL, 501 Fed. 2d 1065, 1067, (Second Circuit) this Court had to decide an issue where the law was not clear. However, the law in the State of New York, at present, is immaculately clear. Upon the facts presented, there is no question that this Court, looking to the law of New York, can see that there is no confusion as to the law.

POINT II

THE SECOND AND THIRD CAUSES OF ACTION WERE CORRECTLY DISMISSED.

The attention of the Court is respectfully directed to CPLR 215-3 which reads

> "The following action shall be commenced within one (1) year

"An action to recover damages for assault, battery... The attention of the Court is further directed to CPLR 214-6 which reads as follows:

"The following actions must be commenced within three (3) years.

"An action to recover damages for malpractice."

At present, there is a conflict in New York Law as to whether a cause of action grounded in lack of informed consent is one of assault or of malpractice.

In this regard, the Court below, very succinctly dealt with the issue. A-34 the second cause of action alleges that the defendants were negligent in failing to obtain plaintiff's informed consent to the surgery. There is a conflict in the law as to whether the three (3) year statute of limitations for such an allegation is governed by CPLR 214-6 or CPLR 215-3. Which ever statute governs however, it makes little difference since the three (3) years have passed in any event. Thus plaintiff's second cause of action is likewise barred by the statute of limitations.
The Court went on to say (A-35) in the third cause of action plaintiff alleges that the defendant failed to obtain her informed consent and thereby committed a trespass, assault and battery. Again, which ever statute of limitations applies, either one (1) year under CPLR 215-3 or three (3) years under CPLR 214-6, the action is still time barred especially in view of the fact that the continuous treatment doctrine would not be applicable.

POINT III

THE FOURTH CAUSE OF ACTION IS LIKEWISE TIME BARRED.

The plaintiff sets forth a presumed cause of action

within count number 4 grounded in fraud. However the grounding of the action in fraud, was, an attempt to evade these pricked application of the three (3) year statute of limitations and bring the actior within the six (6) year the statue of limitations.

This was very succinctly set forth in the opinion of the Court below (A-35).

> "The fourth claim of the plaintiff's complaint alleges that the defendant's perpetrated a fraud when they induced her to have which she contends was unnecessary open heart surgery. Such an allegation hardly seems appropriate for the type of injury allegedly sustained, and I viewed the fraud claim here, within six (6) years statute of limitations, as an attempt to overcome the obvious limitation problem inherent in the entire case. The New York Courts themselves have consistently held in the malpractice actions, that it is the three (3) statute which applies and not the six (6) year fraud statute."

The Court went on to cite two (2) cases significant portions which are set forth below.

GAUTIERI v. NEW ROCHELLE HOSPITAL ASSOCIATION, 4 App. Div. 2d 874, 166 NY Supp 2d 934, 2d (1957) Aff. 5 NY 2d 952, 183 NY Supp 2d (1959) wherein the following language is imporatant and of significance the single causes of action states that respondent entered into a contract in connection with entering appellant's hospital for surgery, and agreed to pay appellant for the use of its facilities, together with necessary, competent and capable help and nurses; that appellant was under a duty to use care in the choice of said help and nurses but breached that duty, and that appellant's said breach of duty caused the respondent damages. The

appeals from an order denying a motion to dismiss the complaint on the ground that the cause of action did not accrue within the time limited by law in the commencement of an action.

> "It is immaterial whether the action be regardedas ex-contractu or ex-delicto. Since appellant's common law duty and its implied contractual obligation were one in the same, the suit, however labelled, is the one in negligence, at least for time limitation purposes...accordingly, the three (3) year period of limitations applies. In GOLIA v. HEALTH INSURANCE PLAN OF GREATER NEW YORK, 6 App. Div. 2d 884, 177 NY Supp 2d 550, (Second-1958)
>
> "The first cause of action, as pleaded against the partnership, states no different cause of action than that pleaded against the individuals who are members of the partnership. It is to recover damages for malpractice and is consequently barred by the two (2) year statute of limitations...although the persons compromising partnership may be sued in the partnership name...the partnership is not a separate entity which may be held liable for negligence on the theory that it permitted ANDREW GOLIA to be treated by unskilled or incompetent agents or employees. The acts complained of against the partnership with those of its individual members acting in their professional capacity in the treatment of said ANDREW GOLIA...as to the second and third causes of action, which purport to declare in contract and in fraud and in deceit, respectively, it is our opinion that, however labelled, they are nevertheless, as is the first cause of action, to recover damages for malpractice, at least for time limitation purposes..."

CONCLUSION

THE COURT BELOW WAS CORRECT IN GRANTING SUMMARY JUDGMENT DISMISSING THE COMPLAINT OF THE PLAINTIFFS IN THAT THERE WAS NO EXTENSION OF

THE APPLICABLE STATUTE OF LIMITATIONS SUCH THAT THE CAUSES OF ACTION SET FORTH IN THE COMPLAINT OF THE PLAINTIFFS WERE BARRED BY LAW.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DIANA M. SCHUM,

Plaintiff-Appellant,

- *against* -

CHARLES P. BAILEY, M.D., et al.,

Defendants-Appellee

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

That on the 23 *day of* October *19*75 *at*

deponent served the annexed Brief for Appellee

1) Shedd Moraites Rath
410 Park Ave , N.Y., N.Y.
2) McAlloon Friedman Mandel Malang & Carroll
75 Maiden Lane, N.Y., N.Y
3) Smith Griffen & Scully
100 William Street, N.Y., N.Y.

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 23d
day of October *19* 75

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977